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PART IV



DEPARTMENT OF LABOR

Office of the Secretary

**Employment and Training
Administration**

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EMPLOYMENT OF ALIENS IN THE UNITED STATES

Labor Certification Process

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Title 29—Labor
SUBTITLE A—OFFICE OF THE SECRETARY
OF LABOR

PART 60—IMMIGRATION: IMMIGRANT
LABOR CERTIFICATIONS

Deletion of Part: Transfer of Regulations to
20 CFR Part 656

Notice is hereby given that the Department of Labor, Employment and Training Administration, is revising its regulations, heretofore published as 29 CFR Part 60, on the granting of labor certifications on behalf of aliens who seek to work permanently within the United States. The revised regulations are published in this issue as a separate document which redesignates the regulations as 20 CFR Part 656. This document deletes the present 29 CFR Part 60—Immigration: Immigrant Labor Certifications, effective February 18, 1977.

Signed at Washington, D.C. this 18th day of January, 1977.

WILLIAM H. KOLBERG,
Assistant Secretary for
Employment and Training.

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CHAPTER V—EMPLOYMENT AND TRAINING
ADMINISTRATION, DEPARTMENT
OF LABOR

PART 656—LABOR CERTIFICATION PROCESSES
FOR PERMANENT EMPLOYMENT
OF ALIENS IN THE UNITED STATES

Notice is hereby given that the Department of Labor, Employment and Training Administration, is publishing new regulations governing the labor certification process for the permanent employment of aliens in the United States. The regulations, designated 20 CFR Part 656, replace the Department's previous regulations at 29 CFR Part 60—Immigration: Immigrant Labor Certifications, which are being rescinded in a separate document being published in today's FEDERAL REGISTER.

The regulations are being issued under section 212(a)(14) of the Immigration and Nationality Act, which provides that certain aliens may not obtain a visa for entry into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified, by granting a labor certification, that:

(1) There are not sufficient United States workers who are able, willing, qualified and available to perform the work; and

(2) The employment of the aliens will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulations set forth the labor certification process in detail. They delineate the responsibilities of the public employment service in assisting employers to find available United States workers. They also set forth the responsibility of employers who desire to employ aliens on a permanent basis. For example, such employers must recruit U.S. workers by advertising, through the

public employment service, and by other reasonable means, in order to make a good faith test of U.S. worker availability. An employer's advertising, moreover, must offer prevailing wages and working conditions so as to avoid any potential adverse effect upon the wages and working conditions of U.S. workers.

The regulations implement the Immigration and Nationality Act Amendments of 1976 to the extent those amendments affect the labor certification process.

The regulations implement the amendments made to the Immigration and Nationality Act by Title VI of the Health Professions, Educational Assistance Act of 1976 to the extent those amendments affect the labor certification process.

The regulations were published as proposed rule-making on November 5, 1976 at 41 FR 48938. Comments were invited until December 6, 1976. About seventy persons and organizations submitted comments. The most significant comments were as follows:

1. The proposed Schedule A included only physical therapists who had Ph.D.s or master's degrees. The comment process revealed that there is a shortage of U.S. workers who have bachelor's degrees in physical therapy. Schedule A has been revised to include physical therapists who have bachelor's degrees.

2. Some commenters requested a definition of the terms "science" and "art" for purposes of Group II of Schedule A. The final regulations include such a definition.

3. One comment requested that Group IV of Schedule A be expanded to include aliens who will be engaged in the United States in managerial or executive positions with the same international corporations or organizations which currently employ them. Such aliens have been added to Schedule A, Group IV. In addition, upon further discussion with the INS and the Department of State, the words "specialized knowledge" were deleted as they represented too broad a category of aliens for Schedule A pre-determination purposes.

4. Some commenters suggested that the documentary requirements for household domestic service workers be clarified and simplified. This has been done.

5. Some commenters stated that the documentation required by the basic labor certification process put an unlawful burden on employers. The Department wishes to note that much of the documentation required of employers will be taken care of by the filling out of the Application for Alien Employment Certification form. The regulations have been revised to indicate that the form and its instructions will make clear to employers the extent of their documentation obligations. The Department also wishes to note that, under the statutory scheme, it is clear that Congress intended that employers make an effort to recruit U.S. workers before seeking to employ aliens and that the Department believes that the regulations, which require that

these efforts be documented, do not impose an unreasonable burden on employers.

6. The House Subcommittee on Immigration, Citizenship, and International Law commented that the recent amendment, by Pub. L. 94-571, to sec. 212(a)(14) of the Immigration and Nationality Act with respect to members of the "teaching profession" was intended to apply only to educators at the college and university level, not to all members of the teaching profession. The final regulations have been revised in keeping with the Congressional intent.

7. Many commenters objected to the proposed requirement that the employer and the local employment service office recruit U.S. workers for 60 days. It was pointed out, for example, that State employment service agencies with Statewide computerized Job Banks could recruit Statewide rather quickly. The recruitment period has been reduced to 30 days.

8. Some commentators stated that it was contrary to sec. 212(a)(14) of the Immigration and Nationality Act, as amended by Pub. L. 94-571, for Certifying Officers to consider the availability of U.S. workers outside the area of intended employment who are willing to move to take the job. The Department, however, does not believe that it was Congress' intent to permit employers to recruit and import aliens to take jobs and to ignore or refuse to consider American workers who may live beyond commuting distance from the jobs but who are willing or will be reimbursed to move to take the jobs.

9. Many commenters from Texas objected to the removal of Nurses from Schedule A. Most of these commenters, however, seemed to believe that the removal of nurses from Schedule A would prohibit nurses from entering the country for work purposes. This, however, is not the case. Nurses may still enter the U.S. as immigrants through the regular labor certification route or as nonimmigrants through the temporary immigration procedures administered by the Immigration and Naturalization Service.

10. Some commenters objected to the exclusion from Schedule A, Group III, of persons with religious commitments who work in non-religious occupations such as nursing and teaching. Group III has been revised to include persons with a religious commitment who will work for non-profit religious organizations.

11. Some commenters objected to the definition of "agent" which, as proposed, included an attorney. The regulations have been revised to clarify this point. Attorneys may be agents, but need not necessarily be agents.

12. One commenter suggested that prior experience be required for aliens seeking certification for Schedule A Group III religious occupations. This suggestion has been accepted. The requirement for 2-years experience for these religious occupations is the same requirement as that for the "priest and minister" "special immigrant" set forth

at sec. 101(a) (27) (D) (i) of the Immigration and Nationality Act.

13. One commentator suggested that it was unlawful for the Department to require that professionals have a job offer before they may receive a labor certification. The Department, however, has always believed that it could require job offers of any alien seeking to become the beneficiary of a labor certification as a reasonable method of carrying out the Secretary's statutory obligation. Heretofore the Department, recognizing that professionals were not required to have prearranged employment in order to obtain a visa, had decided not to require a job offer for a labor certification. However, it has been the Department's experience, that it is very difficult to adequately determine the availability of U.S. workers without a job opportunity to which U.S. workers may be referred. Nor, absent a specific job opportunity, can the adverse effect of an alien's employment of similarly employed U.S. workers be adequately determined. It should be noted too that Pub. L. 94-571 recently amended the Immigration and Nationality Act and that the law now requires prearranged employment for professionals for purposes of obtaining an employment related preference status.

14. Some commenters requested that the Department set forth standards for determining whether or not an alien was of "exceptional ability" for Schedule A, Group II purposes. The Department has added detailed requirements for documentation for the purposes of showing exceptional ability. It is intended that such aliens have international recognition and other evidence of their exceptional ability. Such aliens should be so far above the average members of their field that they will clearly be an asset to the United States.

15. One commenters stated that since there are a great many performing artists who are unemployed in the U.S. today, artists of exceptional ability should not be placed on Schedule A. The Department has taken this category of aliens off of Schedule A.

16. Some commenters objected to the statement in the preamble to the proposed regulations wherein the Department reasserted its belief that labor certification determinations were not judicially reviewable under the Administrative Procedure Act. Both the House and the Senate Reports on the 1976 amendments to the Administrative Procedure Act note favorably Professor Davis' testimony that the Congress never intended the Administrative Procedure Act to be jurisdictional. The Reports, however, note that several Courts of Appeals have held otherwise in an effort to avoid the harshness of the sovereign immunity doctrine. The 1976 amendments, in limiting sovereign immunity, leave the defense of "agency discretion" untouched (see p. 12 of H. Rpt. 94-1656). The labor certification determination under sec.

212(a) (14) of the Immigration and Nationality Act is clearly an action committed to agency discretion, and is clearly exempted from judicial review under the provisions of the Administrative Procedure Act.

The Department would like to note that regional Certifying Officers have been notified by telegraphic instruction to implement the amendments to sec. 212(a) (14) of the Immigration and Nationality Act made by Pub. L. 94-571 as of the effective date of those statutory amendments.

Accordingly, Title 20 of the Code of Federal Regulations is amended by adding a new Part 656, effective February 18, 1977 for all labor certifications filed pursuant to the requirements of these regulations at any Consular or Immigration office or at any local employment service office on or after the effective date of this Part (applications filed prior to Feb. 18, 1977 will be processed pursuant to the prior regulations at 29 CFR Part 60) to read as follows:

Subpart A—Purpose and Scope of Part 656

- Sec. 656.1 Purpose and scope of Part 656.
- 656.2 Description of the Immigration and Nationality Act and of the Department of Labor's role thereunder.

Subpart B—Occupational Labor Certification Determinations

- 656.10 Schedule A.
- 656.11 Schedule B.
- Subpart C—Labor Certification Process
- 656.20 Introduction.
- 656.21 Basic labor certification application process.
- 656.22 Applications for labor certifications for Schedule A occupations.
- 656.23 Applications for labor certifications for Schedule B occupations; requests for waivers from Schedule B.
- 656.24 Labor certification determinations.
- 656.25 Procedures following a labor certification determination.
- 656.26 Administrative-judicial review of denials of labor certification.
- 656.27 Hearings.
- 656.28 Document transmittal following the granting of a labor certification.
- 656.29 Filing of a new application after the denial of a labor certification.
- 656.30 Validity of and invalidation of labor certifications.
- 656.31 Labor certification applications involving fraud or willful misrepresentation.
- 656.32 Fees for services and documents.

Subpart D—Determination of Prevailing Wage

- 656.40 Determination of prevailing wage for labor certification purposes.

Subpart E—Definitions

- 656.50 Definitions for purposes of this Part, of terms used in this Part.

Subpart F—Addresses of Department of Labor Regional Offices

- 656.60 Addresses of Department of Labor regional offices.

AUTHORITY: Sec. 212(a) (14) of the Immigration and Nationality Act, 8 U.S.C. 1101 et seq.; Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 et seq., unless otherwise noted.

Subpart A—Purpose and Scope of Part 656

§ 656.1 Purpose and scope of Part 656.

(a) Under section 212(a) (14) of the Immigration and Nationality Act (Act) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

(b) The regulations under this Part set forth the procedures whereby such immigrant labor certifications may be applied for, and given or denied.

§ 656.2 Description of the Immigration and Nationality Act and of the Department of Labor's role thereunder.

(a) (1) *Description of the Act.* The Immigration and Nationality Act (Act) regulates the admission of aliens into the United States. The Act designates the Attorney General and the Secretary of State as the principal administrators of its provisions.

(2) The Immigration and Naturalization Service (INS) performs most of the Attorney General's functions under the Act.

(3) The Consular offices of the Department of State throughout the world are generally the initial contact for aliens in foreign countries who wish to come to the United States. These offices determine the type of visa for which aliens may be eligible, obtain visa eligibility documentation, and issue visas.

(b) *Burden of proof under the Act.* Section 291 of the Act states, in pertinent part, that:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act . . .

(c) *Numerical limitations on immigrant visas under the Act.* (1) Immigrant visas may be given only on an individual basis:

(2) Except for immediate relatives of U.S. citizens, to whom no numerical restriction applies, only 290,000 immigrant visas may be issued in each fiscal year, of which

(i) No more than 120,000 may be issued to immigrants born in the Western Hemisphere;

(ii) No more than 170,000 may be issued to immigrants born in the Eastern Hemisphere; and

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(iii) No more than 20,000 may be issued to immigrants born in a single country.

(3) No numerical restriction exists on the number of labor certifications which may be issued by the Department of Labor in any year.

(d) *Visa preferences including non-preference status.* (1) Under section 203 of the Act certain immigrants are eligible for preferences in obtaining visas. The INS has responsibility for determining whether such aliens qualify for preferences. The preferences for which an immigrant may be eligible are:

(i) First, second, fourth and fifth preferences, which require a close family relationship between the alien and a United States citizen or permanent resident alien of the United States;

(ii) Third preference, which requires that the alien's services be sought by an employer, and that the alien be a qualified member of a profession or a person who, because of exceptional ability in the sciences or the arts, will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States;

(iii) Sixth preference, which requires that the alien be capable of performing some specific kind of skilled or unskilled labor which is not of a temporary or seasonal nature, and for which a shortage of employable and willing persons exists in the United States; and

(iv) Seventh preference, which requires that the alien have a refugee status as described at section 203(a)(7) of the Act.

(2) Under section 203(a)(8) of the Act aliens, who are not immediate relatives of U.S. citizens, and who are not eligible for one of the preferences described in paragraph (d)(1) of this section, may be eligible for a nonpreference status and obtain visas strictly in chronological order.

(e) *Role of the Department of Labor.* (1) The role of the Department of Labor under the Act derives from section 212(a)(1), which provides that certain aliens who seek to immigrate to the United States for the purpose of employment in the United States are not eligible for a visa and shall be excluded unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(i) There are not sufficient United States workers, who are able, willing, qualified and available at the time at application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(ii) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

(2) This certification is referred to in this part as a "labor certification".

(3) Aliens required to be a beneficiary of a labor certification by section 212(a)(14) of the Act are:

(i) Aliens who are eligible for a nonpreference status as described in paragraph (d)(2) of this section; and

(ii) Aliens who are eligible for third or sixth preferences described in para-

graphs (d)(1)(ii) and (d)(1)(iii) of this section.

(4) The Department of Labor issues labor certifications for both the temporary and permanent employment of aliens in the United States. The regulations under this Part apply only to labor certifications for permanent employment.

Subpart B—Occupational Labor Certification Determinations

§ 656.10 Schedule A.

The Administrator, United States Employment Service (Administrator) has determined that there are not sufficient United States workers who are able, willing, qualified and available for the occupations listed below on Schedule A and that the wages and working conditions of the United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations:

SCHEDULE A

(a) Group I:

(1) Persons who have received an advanced degree (equivalent to a Ph.D. or master's degree conferred by a United States college or university) in any of the following specialties from an institution of higher learning accredited in the country where the degree was obtained:

(i) Dietetics:

(2) Persons who have received a degree (equivalent to a bachelor's degree conferred by a United States college or university) in any of the following specialties from an institution of higher learning accredited in the country in which the degree was obtained:

(i) Physical Therapy.

(3) Definitions of Group I occupations:

(i) "Dietetics" means the occupation which involves the application of the principles of nutrition to plan menus and diets and direct the preparation and serving of meals. This occupation includes activities involved with service programs designed to feed individuals and groups with special nutritional requirements in schools, restaurants, and other institutions, and participation in research in the field of nutrition.

(ii) "Physical Therapy" means the occupation which involves the treatment of patients with disabilities, disorders and injuries to relieve pain, develop or restore function, and maintain performance, using physical means such as exercise, massage, heat, water, light, and electricity, as prescribed by a medical doctor.

(b) Group II:

Aliens (except for aliens in the performing arts) of exceptional ability in the sciences or arts including college and university teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States. For purposes of this group, the term "science or art" means any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien, however, need not have studied at a college or university in order to qualify for the Group II occupation.

(c) Group III:

(1) Aliens who seek admission to the United States in order to perform a religious occupation, such as the preaching or teaching of religion; and

(2) Aliens with a religious commitment who seek admission into the United States

in order to work for a nonprofit religious organization.

(d) Group IV:

(1) Aliens who have been admitted to the United States in order to work, and who are currently working, in managerial or executive positions with the same international corporations or organizations with which they were continuously employed for one year before they were admitted; and

(2) Aliens who will be engaged in the United States in managerial or executive positions with the same international corporations or organizations with which they have been continuously employed for the immediately prior year.

§ 656.11 Schedule B.

(a) The Administrator has determined that there generally are sufficient United States workers who are able, willing, qualified and available for the occupations listed below on Schedule B and that the wages and working conditions of United States workers similarly employed will generally be adversely affected by the employment in the United States of aliens in Schedule B occupations:

SCHEDULE B

- (1) Assemblers
- (2) Attendants, Parking Lot
- (3) Attendants (Service Workers such as Personal Service Attendants, Amusement and Recreation Service Attendants)
- (4) Automobile Service Station Attendants
- (5) Bartenders
- (6) Bookkeepers II
- (7) Carpetakers
- (8) Cashiers
- (9) Charworkers and Cleaners
- (10) Chauffeurs and Taxicab Drivers
- (11) Cleaners, Hotel and Motel
- (12) Clerks, General
- (13) Clerks, Hotel
- (14) Clerks and Checkers, Grocery Stores
- (15) Clerk Typists
- (16) Cooks, Short Order
- (17) Counter and Fountain Workers
- (18) Dining Room Attendants
- (19) Electric Truck Operators
- (20) Elevator Operators
- (21) Floorworkers
- (22) Groundskeepers
- (23) Guards
- (24) Helpers, any Industry
- (25) Hotel Cleaners
- (26) Household Domestic Service Workers
- (27) Housekeepers
- (28) Janitors
- (29) Key Punch Operators
- (30) Kitchen Workers
- (31) Laborers, Common
- (32) Laborers, Farm
- (33) Laborers, Mine
- (34) Loopers and Toppers
- (35) Material Handlers
- (36) Nurses' Aides and Orderlies
- (37) Packers, Markers, Bottlers, and Related
- (38) Porters
- (39) Receptionists
- (40) Sailors and Deck Hands
- (41) Sales Clerks, General
- (42) Sewing Machine Operators and Hand-stitchers
- (43) Stock Room and Warehouse Workers
- (44) Streetcar and Bus Conductors
- (45) Telephone Operators
- (46) Truck Drivers and Tractor Drivers
- (47) Typists, Lesser Skilled
- (48) Ushers, Recreation and Amusement
- (49) Yard Workers

(b) *Descriptions of Schedule B occupations.* (1) "Assemblers" perform one or more repetitive tasks to assemble

components and subassemblies using hand or power tools to mass produce a variety of components, products or equipment. They perform such activities as riveting, drilling, filing, bolting, soldering, spot welding, cementing, gluing, cutting and fitting. They may use clamps or other work aids to hold parts during assembly, inspect or test components, or attend previously set-up or automatic machines.

(2) "Attendants, Parking Lot" park automobiles for customers in parking lots or garages and may collect fees based on time span of parking.

(3) "Attendants (Service Workers such as Personal Service Attendants, Amusement and Recreation Service Attendants)" perform a variety of routine tasks attending to the personal needs of customers at such places as amusement parks, bath houses, clothing check-rooms, and dressing rooms, including such tasks as taking and issuing tickets, checking and issuing clothing and supplies, cleaning premises and equipment, answering inquiries, checking lists, and maintaining simple records.

(4) "Automobile Service Station Attendants" service automotive vehicles with fuel, lubricants, and automotive accessories at drive-in service facilities; may also compute charges and collect fees from customers.

(5) "Bartenders" prepare, mix, and dispense alcoholic beverages for consumption by bar customers, and compute and collect charges for drinks.

(6) "Bookkeepers II" keep records of one facet of an establishment's financial transactions by maintaining one set of books; specialize in such areas as accounts-payable, accounts-receivable, or interest accrued rather than a complete set of records.

(7) "Caretakers" perform a combination of duties to keep a private home clean and in good condition such as cleaning and dusting furniture and furnishings, hallways and lavatories; beating, vacuuming, and scrubbing rugs; washing windows, waxing and polishing floors; removing and hanging draperies; cleaning and oiling furnaces and other equipment; repairing mechanical and electrical appliances; and painting.

(8) "Cashiers" receive payments made by customers for goods or services, make change, give receipts, operate cash registers, balance cash accounts, prepare bank deposits and perform other related duties.

(9) "Charpenters and Cleaners" keep the premises of commercial establishments, office buildings, or apartment houses in clean and orderly condition by performing, according to a set routine, such tasks as mopping and sweeping floors, dusting and polishing furniture and fixtures, and vacuuming rugs.

(10) "Chauffeurs and Taxicab Drivers" drive automobiles to convey passengers according to the passengers' instructions.

(11) "Cleaners, Hotel and Motel" clean hotel rooms and halls, sweep and mop floors, dust furniture, empty wastebaskets, and make beds.

(12) "Clerks, General" perform a variety of routine clerical tasks not re-

quiring knowledge of systems, or procedures such as copying and posting data, proofreading records or forms, counting, weighing, or measuring material, routing correspondence, answering telephones, conveying messages, and running errands.

(13) "Clerks, Hotel" perform a variety of routine tasks to serve hotel guests such as registering guests, dispensing keys, distributing mail, collecting payments, and adjusting complaints.

(14) "Clerks and Checkers, Grocery Stores" itemize, total, and receive payments for purchases in grocery stores, usually using cash registers; often assist customers in locating items, stock shelves, and keep stock-control and sales-transaction records.

(15) "Clerk Typists" perform general clerical work which, for the majority of duties, requires the use of typewriters; perform such activities as typing reports, bills, application forms, shipping tickets, and other matters from clerical records, filing records and reports; posting information to records; sorting and distributing mail, answering phones and similar duties.

(16) "Cooks—Short Order" prepare and cook to order all kinds of short-preparation-time foods; may perform such activities as carving meats, filling orders from a steamtable, preparing sandwiches, salads and beverages, and serving meals over a counter.

(17) "Counter and Fountain Workers" serve food to patrons at lunchroom counters, cafeterias, soda fountains, or similar public eating places; take orders from customers and frequently prepare simple items, such as dessert dishes; itemize and total checks; receive payment and make change; clean work areas and equipment.

(18) "Dining Room Attendants" facilitate food service in eating places by performing such tasks as removing dirty dishes, replenishing linen and silver supplies, serving water and butter to patrons, and cleaning and polishing equipment.

(19) "Electric Truck Operators" drive gasoline- or electric-powered industrial trucks or tractors equipped with forklift, elevating platform, or trailer hitch to move and stack equipment and materials in a warehouse, storage yard, or factory.

(20) "Elevator Operators" operate elevators to transport passengers and freight between building floors.

(21) "Floorworkers" perform a variety of routine tasks in support of other workers in and around such work sites as factory floors and service areas, frequently at the beck and call of others; perform such tasks as cleaning floors, materials and equipment, distributing materials and tools to workers, running errands, delivering messages, emptying containers, and removing materials from work areas to storage or shipping areas.

(22) "Groundskeepers" maintain grounds of industrial, commercial, or public property in good condition by performing such tasks as cutting lawns, trimming hedges, pruning trees, repairing fences, planting flowers, and shoveling snow.

(23) "Guards" guard and patrol premises of industrial or business establishments or similar types of property to prevent theft and other crimes and prevent possible injury to others.

(24) "Helpers (any industry)" perform a variety of duties to assist other workers who are usually of a higher level of competency of expertness by furnishing such workers with materials, tools, and supplies, cleaning work areas, machines and equipment, feeding or offbearing machines, and/or holding materials or tools.

(25) "Hotel Cleaners" perform routine tasks to keep hotel premises neat and clean such as cleaning rugs, washing walls, ceilings and windows, moving furniture, mopping and waxing floors, and polishing metalwork.

(26) "Household Domestic Service Workers" perform a variety of tasks in private households, such as cleaning, dusting, washing, ironing, making beds, maintaining clothes, marketing, cooking, serving food, and caring for children or disabled persons. This definition, however, applies only to workers who have had less than one year of documented full-time paid experience in the tasks to be performed, working on a live-in or live-out basis in private households or in public or private institutions or establishments where the worker has performed tasks equivalent to tasks normally associated with the maintenance of a private household. This definition does not include household workers who primarily provide health or instructional services.

(27) "Housekeepers" supervise workers engaged in maintaining interiors of commercial residential buildings in a clean and orderly fashion; assign duties to cleaners (hotel and motel), charworkers, and hotel cleaners, inspect finished work, and maintain supplies of equipment and materials.

(28) "Janitors" keep hotels, office buildings, apartment houses, or similar buildings in clean and orderly condition, and tend furnaces and boilers to provide heat and hot water; perform such tasks as sweeping and mopping floors, emptying trash containers, and doing minor painting and plumbing repairs; often maintain their residence at their places of work.

(29) "Key punch Operators", using machines similar in action to typewriters, punch holes in cards in such a position that each hole can be identified as representing a specific item of information. These punched cards may be used with electronic computers or tabulating machines.

(30) "Kitchen Workers" perform routine tasks in the kitchens of restaurants. Their primary responsibility is to maintain work areas and equipment in a clean and orderly fashion by performing such tasks as mopping floors, removing trash, washing pots and pans, transferring supplies and equipment, and washing and peeling vegetables.

(31) "Laborers, Common" perform routine tasks, upon instructions, and according to set routine, in an industrial, construction or manufacturing environment such as loading and moving equip-

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ment and supplies, cleaning work areas, and distributing tools.

(32) "*Laborers, Farm*" plant, cultivate, and harvest farm products, following the instructions of supervisors, often working as members of a team. Their typical tasks are watering and feeding livestock, picking fruit and vegetables, and cleaning storage areas and equipment.

(33) "*Laborers, Mine*" perform routine tasks in underground or surface mines, pits, or quarries, or at tipples, mills, or preparation plants such as cleaning work areas, shoveling coal onto conveyors, pushing mine cars from working faces to haulage roads, and loading or sorting material onto wheelbarrows.

(34) "*Loopers and Toppers*" (i) tend machines that shear nap, loose threads, and flots from cloth surfaces to give uniform finish and texture, (ii) operate looper machines to close openings in the tops of seamless hose or join knitted garment parts, (iii) loop stitches or ribbed garment parts on the points of transfer bars to facilitate the transfer of garment parts to the needles of knitting machines.

(35) "*Material Handlers*" load, unload, and convey materials within or near plant yards, or work sites under specific instructions.

(36) "*Nurses' Aides and Orderlies*" assist in the care of hospital patients by performing such activities as bathing, dressing and undressing patients and giving alcohol rubs, serving and collecting food trays, cleaning and shaving hair from the skin areas of operative cases, lifting patients onto, and from beds, transporting patients to treatment units, changing bed linens, running errands, and directing visitors.

(37) "*Packers, Markers, Bottlers, and Related*" pack products into containers, such as cartons or crates, mark identifying information on articles, insure that filled bottles are properly sealed and marked, often working in teams on or at end of assembly lines.

(38) "*Porters*" (i) carry baggage by hand or handtruck for airline, railroad or bus passengers, and perform related personal services in and around public transportation environments, (ii) keep building premises, working areas in production departments of industrial organizations, or similar sites in clean and orderly condition.

(39) "*Receptionists*" receive clients or customers coming into establishments, ascertain their wants, and direct them accordingly; perform such activities as arranging appointments, directing callers to their destinations, recording names, times, nature of business and persons seen and answering phones.

(40) "*Sailors and Deck Hands*" stand deck watches and perform a variety of tasks to preserve painted surfaces of ships and to maintain lines, running gear, and cargo handling gear in safe operating condition; perform such tasks as mopping decks, chipping rust, painting clipped areas, and splicing rope.

(41) "*Sales Clerks, General*" receive payment for merchandise in retail estab-

lishments, wrap or bag merchandise, and keep shelves stocked.

(42) "*Sewing Machine Operators and Hand-Stitchers*" (i) operate single- or multiple-needle sewing machines to join parts in the manufacture of such products as awnings, carpets, and gloves; specialize in one type of sewing machine limited to joining operations; (ii) join and reinforce parts of articles such as garments and curtains, sew button-holes and attach fasteners to such articles, or sew decorative trimmings on such articles, using needles and threads.

(43) "*Stock Room and Warehouse Workers*" receive, store, ship, and distribute materials, tools, equipment, and products within establishments as directed by others.

(44) "*Streetcar and Bus Conductors*" collect fares or tickets from passengers, issue transfers, open and close doors, announce stops, answer questions, and signal operators to start or stop.

(45) "*Telephone Operators*" operate telephone switchboards to relay incoming and internal calls to phones in an establishment, and make connections with external lines for outgoing calls; often take messages, supply information and keep records of calls and charges; often are involved primarily in establishing, or aiding telephone users in establishing, local or long distance telephone connections.

(46) "*Truck Drivers and Tractor Drivers*" (i) drive trucks to transport materials, merchandise, equipment or people to and from specified destinations, such as plants, railroad stations, and offices, (ii) drive tractors to move materials, draw implements, pull out objects imbedded in the ground, or pull cables of winches to raise, lower, or load heavy materials or equipment.

(47) "*Typists, Lesser Skilled*" type straight-copy material, such as letters, reports, stencils, and addresses, from drafts or corrected copies. They are not required to prepare materials involving the understanding of complicated technical terminology, the arrangement and setting of complex tabular detail or similar items. Their typing speed in English does not exceed 52 words per minute on a manual typewriter and/or 60 words per minute on an electric typewriter and their error rate is 12 or more errors per 5 minute typing period on representative business correspondence.

(48) "*Ushers (Recreation and Amusement)*" assist patrons at entertainment events to find seats, search for lost articles, and locate facilities.

(49) "*Yard Workers*" maintain the grounds of private residences in good order by performing such tasks as mowing and watering lawns, planting flowers and shrubs, and repairing and painting fences. They work on the instructions of private employers.

(c) *Requests for waivers from Schedule B.* Any employer who desires a labor certification involving a *Schedule B* occupation may request such a waiver by submitting a written request to the appropriate regional Certifying Officer

pursuant to § 656.23 of this Part. (For the addresses of regional Certifying Officers see Subpart F of this Part.)

(d) The Administrator may revise *Schedule B* from time to time on the Administrator's own initiative, upon the request of a Regional Administrator, Employment and Training Administration, or upon the written request of any other person which sets forth reasonable grounds therefor. Such requests should be mailed to the Administrator, United States Employment Service, Room 8000, Patrick Henry Building, 601 D Street, NW., Washington, D.C. 20213.

Subpart C—Labor Certification Process

§ 656.20 Introduction.

(a) A request for a labor certification on behalf of any alien who is required by the Act to become a beneficiary of a labor certification in order to obtain permanent employment within the United States may be filed as follows:

(1) An application for a labor certification, except for an application involving an occupation listed on *Schedule A*, must be filed pursuant to § 656.21 of this Part.

(2) An alien seeking labor certification for an occupation listed on *Schedule A* may apply for a labor certification pursuant to § 656.22 of this Part.

(3) An employer seeking a labor certification for an occupation listed on *Schedule B* may apply for a labor certification pursuant to § 656.23 of this Part.

(b) (1) Aliens and employers may have agents apply for labor certifications on their behalf.

(2) The alien and/or the employer shall sign a statement that the agent is representing the alien and/or employer and that the alien and/or employer takes full responsibility for the accuracy of any representations made by the agent.

(c) Aliens and employers may have attorneys represent them. Each attorney shall file a notice of appearance, naming the attorney's client. Whenever, under this Part, any notice or other document is required to be sent to an employer or alien, the document shall be sent to their attorneys or attorney if they have an attorney or attorneys.

(d) The forms required under this Part for applications for labor certification are available at U.S. Consular offices abroad, at INS offices in the United States, and at local offices of the State employment service agencies. The forms will contain instructions on how to comply with the documentation requirements for applying for a labor certification under this Part.

§ 656.21 Basic labor certification application process.

(a) Except as otherwise provided at § 656.22 of this Part (labor certifications for *Schedule A* occupations), an employer who desires to apply for a labor certification on behalf of an alien shall file, in duplicate, a Department of Labor *Application for Alien Employment Certification* form and any attachments re-

quired by this Part with the local employment service office serving the area where the alien proposes to be employed. The employer shall set forth on the *Application for Alien Employment Certification* form, as appropriate, or in attachments:

(1) A statement of the qualifications of the alien, signed by the alien;

(2) A description of the job offer for the alien employment, including the items required by paragraph (b) of this section;

(3) If the application involves a job offer as a college or university teacher or an alien represented to be of exceptional ability in the performing arts, documentation that the employer selected the alien pursuant to a competitive recruitment and selection process through which the alien was found to be more qualified than any of the U.S. workers who applied for the job;

(4) If the application is for an alien represented to have exceptional ability in the performing arts, documentation to show this exceptional ability such as:

(i) Documents testifying to the current widespread acclaim and international recognition accorded to the alien, receipt of internationally recognized prizes or awards for excellence;

(ii) Documents showing the alien's work experience during the past year did, and the alien's intended work in the United States will, require exceptional ability;

(iii) Published material by or about the alien such as critical reviews in major newspapers, periodicals and trade journals. The title, date and author of such material shall be indicated;

(iv) Documentary evidence of earnings commensurate with the claimed level of ability;

(v) Playbills and star billings;

(vi) Documents attesting to the outstanding reputation of theaters, concert halls, night clubs and other establishments in which the alien has appeared or is scheduled to appear; and/or

(vii) Documents attesting to the outstanding reputation of repertory companies, ballet groups, orchestras or other organizations with which the alien has performed during the past year in a leading or starring capacity;

(5) If the application involves a job offer as a live-in household domestic service worker:

(i) A statement describing the household living accommodations;

(ii) Two copies of the employment contract, each signed and dated by both the employer and the alien (not by their agents). The contract shall clearly state:

(A) The wages to be paid on an hourly and weekly basis;

(B) Total hours of employment per week, and exact hours of daily employment;

(C) That the alien is free to leave the employer's premises during all non-work hours except that the alien may work overtime if paid for the overtime at no less than the legally required hourly rate;

(D) That the alien will reside on the employer's premises;

(E) Complete details of the duties to be performed by the alien;

(F) The total amount of any money to be advanced by the employer with details of specific items, and the terms of repayment by the alien of any such advance by the employer;

(G) That in no event shall the alien be required to give more than two weeks' notice of intent to leave the employment contracted for; and that the employer must give the alien at least two weeks' notice before terminating employment;

(H) That a duplicate contract has been furnished to the alien;

(I) That room and board will be provided at no cost to the worker; and

(J) Any other agreement or conditions not specified on the *Application for Alien Employment Certification* form; and

(iii) (A) Documentation of the alien's paid experience in the form of statements from past or present employers setting forth the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of duties performed on the job, equipment and appliances used, and the amount of wages paid per week or month. The total paid experience must be equal to one full year's employment on a full-time basis. For example, two years' experience working half-days is the equivalent of one year's full time experience. Time spent in a household domestic service training course cannot be included in the required one year of paid experience;

(B) Each statement must contain the name and address of the person who signed it and show the date on which the statement was signed. A statement not in the English language shall be accompanied by a translation certified by the translator as to the accuracy of the translation, and as to the translator's competency to translate.

(b) Except for labor certification applications involving *Schedule A* occupations, the employer shall submit, as part of every labor certification application, on the *Application for Alien Employment Certification* form, as appropriate, or in attachments, documentation which shows clearly that:

(1) The employer has been recruiting at the prevailing wage, as described at § 656.40 of this Part, and at prevailing working conditions, and has reason to think it will continue to be unsuccessful in its recruiting of U.S. workers through the public employment system and/or through other labor referral and recruitment sources normal to the occupation;

(2) The employer has enough funds available to pay the wage or salary offered the alien;

(3) The wage offered equals or exceeds the prevailing wage as determined pursuant to § 656.40 of this Part, and that the employer guarantees that, if a

labor certification is granted, the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;

(4) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly or monthly basis;

(5) The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States;

(6) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;

(7) The job opportunity has been and is clearly open to any qualified U.S. worker;

(8) The job opportunity has been and is being described without unduly restrictive job requirements;

(i) The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, be those defined for the job in the Dictionary of Occupational Titles (DOT) including those for subclasses of jobs, and not include requirements for a language other than English;

(ii) If the job opportunity involves a combination of duties, for example engineer-pilot, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and/or the combination job opportunity is based on a business necessity.

(9) (i) The employer has advertised and is still advertising the job opportunity without success in such media as newspapers of general circulation, and ethnic and professional publications;

(ii) The employer's advertising offers prevailing working conditions and requirements and the prevailing wage for the occupation calculated pursuant to § 656.40 of this Part, states the rate of pay, offers training if the job opportunity is the type for which the employer customarily provides training, and offers wages, terms and conditions of employment which are no less favorable than those offered to the alien;

(iii) The employer's advertising describes the job opportunity with particularity; the documentation shall include a copy of at least one advertisement placed by the employer;

(iv) The employer's advertising has produced no satisfactory results;

(10) The employer has posted within its organization notices of the job opportunity which contain the information required by paragraph (b) (9) (ii) of this section;

(11) The employer's job opportunity is not:

(i) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute, or

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(12) At issue in a labor dispute;

(13) The employer's other efforts to locate and employ U.S. workers for the job opportunity such as recruitment efforts by means of private employment agencies, labor unions, advertisements placed with radio or TV stations, recruitment at trade schools, colleges, and universities or attempts to fill the job opportunity by development or promotion from among its present employees, has been and continues to be unsuccessful;

(14) If unions are customarily used as a recruitment source in the area or industry, they were unable to refer U.S. workers;

(15) The employer's requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer;

(16) If U.S. workers have applied for the job opportunity, they were rejected solely for lawful job-related reasons; and

(17) The employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law.

(c) The local employment service office shall determine if the application is for a labor certification involving Schedule A. If the application is for a Schedule A labor certification, the local employment service office shall advise the employer that the forms must be filed with an INS or Consular Office pursuant to § 656.22 of this Part, and shall explain that the Administrator has determined that U.S. workers in the occupation are unavailable throughout the United States (unless a geographic limitation is applicable) and that the employment of the alien in the occupation will not adversely affect U.S. workers similarly employed.

(d) The local office shall date stamp the application (see § 656.30 for the significance of this date), and shall make sure that the Application for Alien Employment Certification form is complete. If it is not complete the local office shall return it to the employer and shall advise the employer to re-file it when it is completed.

(e) If the Application for Alien Employment Certification form is complete, the local office, using the information on the form, shall prepare and process an employment service job order. If this job order is discriminatory or otherwise unacceptable as a job order under employment service regulations, the local office shall, as appropriate either contact the employer to try to remedy the defect or return the Application for Alien Employment Certification form to the employer with instructions on how the defect can be remedied.

(f) The local office shall calculate, to the extent of its expertise using wage information available to it, the prevailing wage for the job opportunity pursuant to

§ 656.40 of this Part and shall put its finding in writing. If the local office finds that the rate of wages offered is below the prevailing wage, it shall advise the employer to increase the amount offered. If the employer refuses to do so, the local office shall advise the employer that the application will have to be refiled at the local office if the labor certification is denied by the Certifying Officer because the rate of wages does not meet the prevailing wage.

(g) (1) The local office, in cooperation with the employer, shall then attempt to recruit United States workers for a period of 30 calendar days by placing the job order into the regular ES recruitment system, except that, if the employer has a previous job order for the same job on file with the same local office, the 30 days shall be reduced by the number of days which have elapsed since the first job order was filed. As part of these efforts, the employer shall advertise the job in a newspaper of general circulation. This advertisement shall conform to the requirements at § 656.21(b)(9) of this Part, and shall direct applicants to report to the local office for referral to the employer.

(2) The regional Certifying Officer, at the request of a local office manager, may reduce the 30-day recruitment period for good cause shown.

(h) If, after the required recruitment period, the recruitment is not successful, the local office shall send the application, its prevailing wage finding and any appropriate additional information such as local labor market data, to the State office or, if authorized, to the regional Certifying Officer.

(i) A State office, which receives an application, may add appropriate data or comments and shall promptly transmit the application to the appropriate regional Certifying Officer.

§ 656.22 Applications for labor certifications for Schedule A occupations.

(a) An alien or agent of an alien shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification form in duplicate with a U.S. Consular office abroad or with an INS office in the United States, not with the Department of Labor or a State employment service local office.

(b) An alien whose occupation is on Schedule A and who is seeking a third or sixth preference, as described in § 656.2(d)(1)(ii) and (iii) of this Part, shall show evidence of prearranged employment by having an employer complete, and sign, the job offer description portion of the Application for Alien Employment Certification form. There is, however, no need for the employer to provide the other documentation required under this Part for non-Schedule A occupations.

(c) Aliens seeking labor certifications under Group I of Schedule A shall file as part of their labor certification applications documentary evidence of their degrees and of the equivalence of their degrees to United States granted Ph.D.s,

master's or bachelor's degrees, as appropriate.

(d) Aliens who are applying for labor certifications under Group II of Schedule A shall file as part of their labor certification applications documentary evidence testifying to the current widespread acclaim and international recognition accorded them, receipt of internationally recognized prizes or awards for excellence, and documents testifying that they are members of international associations requiring outstanding achievements of their members as judged by recognized international experts in their disciplines or fields. They shall also submit additional documentation supporting their claim to have exceptional ability such as:

(1) Affidavits or published material testifying to their technical training or specialized experience;

(2) Published material by or about the alien. Such material shall identify the title, date and author of each publication or article;

(3) Documentary evidence of earnings commensurate with their claimed level of ability; and/or

(4) Documentation showing that their work experience during the past year did, and their intended work in the United States will, require exceptional ability.

(e) Aliens seeking a labor certification under Group III of Schedule A shall file as part of their labor certification applications documentary evidence showing that they have been primarily engaged in the religious occupation or in working for the non-profit religious organization for the previous two years, and they will be principally engaged (more than 50 percent of working time) in the United States in performing the religious occupation or working for the non-profit religious organization.

(f) If the alien is requesting a preference described at § 656.2(d) of this Part, and if the alien has filed an Application for Alien Employment Certification form at a Consular office, the Consular Officer shall review the form as appropriate and shall then forward the application to the INS in accordance with the procedures of the Department of State and the INS.

(g) An Immigration Officer, or Consular Officer (except as provided in paragraph (f) of this section), shall determine whether the alien has met the applicable requirements of this section and of Schedule A (§ 656.10) of this Part, shall review the application and shall determine whether or not the alien is qualified for and intends to pursue the Schedule A occupation.

(1) The Immigration or Consular Officer may request an advisory opinion as to whether the alien is qualified for the Schedule A occupation from the Division of Labor Certifications, United States Employment Service, Washington, D.C. 20213.

(2) The Schedule A determination of the INS or Department of State shall be conclusive and final. The alien, therefore, may not make use of the review

procedures set forth at § 656.26 of this Part.

(h) If the alien qualifies for the occupation, the Immigration or Consular Officer shall indicate the occupation on the Application for Alien Employment Certification form. The Consular or Immigration Officer shall then promptly forward a copy of the Application for Alien Employment Certification form, without attachments, to the Administrator, indicating thereon the occupation, the Immigration or Consular office which made the Schedule A determination and the date of the determination (see § 656.30 for the significance of this date).

§ 656.23 Applications for labor certifications for Schedule B occupations: requests for waivers from Schedule B.

(a) Occupations listed on Schedule B require little or no education or experience, and employees can be trained quickly to perform them satisfactorily. In addition, many of these occupations are entry jobs in their industries which offer opportunities for high school graduates and other U.S. workers who otherwise would have difficulty finding their first employment and gaining work experience. The Administrator has determined that there is generally a nationwide surplus of U.S. workers who are available for and who can qualify for Schedule B job opportunities which offer prevailing wages and working conditions.

(b) Some of the occupations on Schedule B are also often characterized by relatively low wages, long and irregular working hours, and poor working conditions which lead to excessive turnover. In most instances, the Administrator has determined through past experience that the employment of aliens has failed to resolve such employment problems since the aliens, like U.S. workers, often quickly move to other jobs. This results in an adverse effect upon the wages and working conditions of U.S. workers who are employed in occupations which require similar education and experience.

(c) Therefore, the Administrator has determined that for occupations listed on Schedule B, U.S. workers are generally available throughout the United States, and that the employment of aliens in Schedule B occupations will generally adversely affect the wages and working conditions of U.S. workers similarly employed.

(d) An individual employer or the employer's agent may petition the regional Certifying Officer for the geographic area in which the job opportunity is located for a Schedule B waiver on behalf of an alien with respect to a specific job opportunity. (For the addresses of regional Certifying Officers see Subpart F of this Part.) The petition shall include:

(1) The documentation required by § 656.21 of this Part;

(2) Documentary verification, which the employer has obtained from the local employment service office which contains the job opportunity in its administrative area, that the employer has had a job order for the same job on file

with the same local office for a period of 30 calendar days and that the local office and the employer, using the job order, were not able to obtain a qualified U.S. worker.

(e) The regional Certifying Officer, using the procedures and standards set forth at § 656.24 of this Part, shall either grant or deny the waiver and shall inform the employer of the determination in writing.

(f) If the waiver is granted, the regional Certifying Officer shall issue a labor certification.

(g) If the waiver is denied, the regional Certifying Officer shall deny the labor certification and shall follow the procedures at § 656.25(f)(2) of this Part.

§ 656.24 Labor certification determinations.

(a) If the labor certification presents a special or unique problem, the regional Certifying Officer may refer the application to the national Certifying Officer for determination. If the Administrator has directed that certain types of applications or specific applications be handled in the U.S. national office, the regional Certifying Officer shall refer such applications to the National Certifying Officer.

(b) The regional or national Certifying Officer, as appropriate, shall make a determination either to grant the labor certification or to issue a Notice of Findings on the basis of whether or not:

(1) The employer has met the requirements of § 656.21 of this Part;

(2) There is in the United States a worker who is able, willing, qualified and available for and at the place of the job opportunity according to the following standards:

(i) The Certifying Officer, in judging whether a U.S. worker is willing to take the job opportunity, shall look at the documented results of the employer's and the employment service office's recruitment efforts, and shall determine if there are other appropriate sources of workers where the employer should have recruited or might be able to recruit U.S. workers.

(ii) The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed, except that, if the application involves a job opportunity as a college or university teacher, or for an alien whom the Certifying Officer determines to be currently of exceptional ability in the performing arts, the U.S. worker must be at least as qualified as the alien;

(iii) In determining whether U.S. workers are available, the Certifying Officer shall consider as many sources as is appropriate and shall look to the public employment service system as one source.

(iv) In determining whether a U.S. worker is available at the place of the job opportunity, the Certifying Officer shall consider U.S. workers living or

working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or, if the prevailing practice among employers employing workers in the occupation in the area of intended employment is to pay such relocation expenses, at the employer's expense.

(3) The employment of the alien will have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination the Certifying Officer shall consider such things as labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and the prevailing working conditions, such as hours, in the occupation.

§ 656.25 Procedures following a labor certification determination.

(a) After making a labor certification determination, the Certifying Officer shall notify the employer in writing of the determination and shall send a copy of the notice to the alien.

(b) If a labor certification is granted, the Certifying Officer shall follow the document transmittal procedures set forth at § 656.28 of this Part.

(c) If a labor certification is not granted, the Certifying Officer shall issue to the employer, with a copy to the alien, a *Notice of Findings*, as defined in § 656.50 of this Part. The *Notice of Findings* shall:

(1) Contain the date on which the *Notice of Findings* was issued;

(2) State the specific bases on which the decision to issue the *Notice of Findings* was made;

(3) Specify a date, 35 calendar days from the date of the *Notice of Findings*, by which documentary evidence may be submitted to rebut the bases of the determination, and advise that, if the rebuttal evidence has not been mailed by certified mail by the date specified, the *Notice of Findings* shall automatically become the final decision of the Secretary, denying the labor certification; and

(4) Cite the rebuttal procedures set forth at paragraphs (d), (e) and (f) of this section.

(d) Rebuttal evidence may be submitted:

(1) By the employer; and
(2) By the alien, but only if the employer has also submitted rebuttal evidence.

(e) Documentary evidence to rebut the basis of a *Notice of Findings* shall be mailed by certified mail on or before the date specified in the *Notice of Findings* to the Certifying Officer who issued the *Notice of Findings*.

(f) If evidence rebutting the bases of the *Notice of Findings* is submitted on time, the Certifying Officer shall review that evidence in relation to the evidence in the file, and shall then either grant or deny the labor certification pursuant to the standards set forth in § 656.24(b) of this Part.

(g) The Certifying Officer shall send a *Determination and Transmittal form*

to the employer, and shall send a copy to the alien.

(1) If a labor certification is granted, the Certifying Officer shall follow the document transmittal procedures set forth at § 656.28 of this Part.

(2) If the labor certification is denied, the *Determination and Transmittal* form shall:

(i) Contain the date of the determination;

(ii) State the reasons for the determination;

(iii) Quote the request for review procedures at § 656.26 (a) and (b) of this Part; and

(iv) Advise that, if a request for review is not made within the specified time, the denial shall become the final determination of the Secretary.

§ 656.25 Administrative-judicial review of denials of labor certification.

(a) If a labor certification is denied, a request for an administrative-judicial review of the denial may be made:

(1) By the employer; and

(2) By the alien, but only if the employer also requests such a review.

(b) The request for review shall be in writing and shall be sent by certified mail to the Certifying Officer who denied the application within 35 calendar days of the date of the determination, that is, by the date specified on the *Determination and Transmittal* form, shall clearly identify the particular labor certification determination from which review is sought, shall set forth the particular grounds for the request, and include all the documents which accompanied the *Determination and Transmittal* form. If the labor certification denial involved an application as a college or university teacher or an application on behalf of an alien represented to be of exceptional ability in the performing arts, the employer may designate the names and addresses of persons or organizations of specialized competence which the employer has asked to submit amicus briefs.

(c) Upon the receipt of a request for review, the Certifying Officer shall immediately assemble an Appeal File, which shall be in chronological order and indexed, and which shall contain the request for review, the complete application file, and copies of all other written material such as pertinent parts and pages of surveys, reports, etc., upon which the denial was based. The Certifying Officer shall send the Appeal File to the Chief Administrative Law Judge of the Department of Labor, Vanguard Building, 1111 20th Street, N.W., Washington, D.C. 20036. If the certification was denied by the national Certifying Officer, the national Certifying Officer shall also send a copy of the Appeal File to the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, Room N2101, 200 Constitution Avenue, N.W., Washington, D.C. 20210. If the certification was denied by a regional Certifying Officer, the regional Certifying Officer shall send a copy of the Appeal File to the Administrator, and a copy to the Soli-

tor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services. In the cases of denials involving the college and university teachers and aliens represented to be of exceptional ability in the performing arts, two additional copies of the Appeal File shall be sent to the Chief Administrative Law Judge.

(d) A hearing officer, designated by the Chief Administrative Law Judge, shall afford all parties, including the Solicitor, 30 days to submit or decline to submit any appropriate legal brief. In the cases of denials involving college and university teachers and aliens represented to be of exceptional ability in the performing arts, if the employer has designated a person or organization which the employer has asked to submit an amicus brief, the hearing officer shall also afford the person or organization 30 days to submit an amicus brief.

(e) The hearing officer shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review, and any legal briefs submitted and shall:

(1) Affirm the denial of the labor certification; or

(2) Direct the Certifying Officer to grant the certification; or

(3) Remand the matter to the Certifying Officer for further consideration or factfinding and determination; or

(4) Direct that a hearing be held on the case.

(f) The hearing officer shall notify the employer, the alien, the Certifying Officer, and the Solicitor of the determination, and shall return the record to the Certifying Officer unless the case has been set for hearing.

(g) If the case is remanded, the Certifying Officer shall do the additional factfinding or consideration, make a new determination, and issue a new *Determination and Transmittal* form.

(h) If the case has been set for hearing, the hearing officer shall notify the employer, the alien, the Certifying Officer and the Solicitor:

(1) Of the date, time, and place of the hearing; and

(2) That the hearing may be rescheduled upon written request and for good cause shown.

(i) If a labor certification has been ordered granted, the Certifying Officer shall grant the certification and shall follow the document transmittal procedures set forth at § 656.28 of this Part.

§ 656.27 Hearings.

(a) If a hearing has been ordered by the hearing officer pursuant to § 656.26

(e)(4) of this subpart, the hearing officer:

(1) May reschedule the hearing, as appropriate;

(2) Shall regulate the course of the hearing;

(3) Shall assure that all relevant issues are considered;

(4) Shall rule on the introduction of evidence and testimony;

(5) Shall rule on appropriate motions; and

(6) Shall take any other action, consistent with due process, necessary to insure an orderly hearing.

(b) The testimony at the hearing shall be recorded and transcribed except to the extent the substance thereof is stipulated for the record.

(c) The Department of Labor shall be represented by the Solicitor of Labor.

(d) The parties shall be afforded the opportunity to present, examine, and cross-examine witnesses.

(e) The hearing officer may elicit testimony from witnesses, but shall not act as advocate for any party.

(f) The hearing officer may receive and make part of the record documentary evidence offered by any party. Copies thereof shall be made available to the other interested parties by the party submitting the evidence.

(g) The case record, or any portion thereof, shall be available for inspection and copying by any party at, prior to, or subsequent to the hearing upon request. Special procedures may be used for disclosure of medical and psychological records such as disclosure to a physician designated by the individual.

(h) The hearing shall be conducted in accordance with sections 5-8 of the Administrative Procedures Act, 5 U.S.C. 553 et seq.

(i) Technical rules of evidence shall not apply, but rules or principles designed to assure production of the most credible evidence available, and to subject testimony to test by cross-examination, shall be applied where reasonably necessary by the hearing officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence.

(j) The general provisions governing discovery as provided in the Rules of Civil Procedure for the United States District Court, Title V, 28 U.S.C., Rules 26 through 37, may be made applicable in any hearing conducted under this part to the extent that the hearing officer concludes that their use would promote the efficient advancement of the hearing.

(k) When a public officer is a respondent in a hearing in the officer's official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the proceeding does not abate and the officer's successor shall be automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantive rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(l) The hearing officer shall have jurisdiction to decide all issues of fact and related issues of law, but shall not have jurisdiction to decide upon the validity of Federal statutes or regulations.

(m) The hearing officer may rule: (1) that the case is improperly before it, that is, that there is a lack of jurisdiction over the case;

(2) that the request for review has been withdrawn in writing;

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(3) that reasonable cause exists to believe that the request for review has been abandoned or that repeated requests for re-scheduling are arbitrary and for the purpose of unduly delaying or avoiding a hearing; or

(4) render such other rulings as are appropriate to the issues in question.

(n) The hearing officer shall prepare a written decision and order. The decision shall state its legal and/or factual bases. The hearing officer shall send a copy of the decision and order to the applicant, the Certifying Officer, the Administrator, and the Solicitor. The hearing officer may order the labor certification granted, affirm the denial of the certification, or remand the case to the Certifying Officer for further fact-finding.

(o) Except when a case is remanded to the Certifying Officer for further fact-finding, the decision of the hearing officer shall be the final decision of the Secretary of Labor.

§ 656.28 Document transmittal following the granting of a labor certification.

If a labor certification is granted, except for labor certifications granted for occupations listed on *Schedule A*, the Certifying Officer shall:

(a) If the employer has already indicated in writing that it will file a petition for a preference described at § 656.2(d)(1) of this Part, send the certified application containing the official labor certification stamp, supporting documents, and complete *Determination and Transmittal* form to the employer or, if appropriate, to the employer's agent. The *Determination and Transmittal* form shall indicate that the employer should submit all the documents to the appropriate INS office.

(b) If the employer has not indicated in writing whether or not it will, or that it will not, file a petition for a preference described at § 656.2(d)(1) of this Part,

(1) If the alien is abroad and preference or non-preference numbers are currently available, send the certified application containing the official labor certification stamp, supporting documents, and complete *Determination and Transmittal* form to the appropriate Consular office;

(2) If the alien is in the U.S. and preference or non-preference numbers are currently available, send the certified application containing the official labor certification stamp, supporting documentation, and complete *Determination and Transmittal* form to the employer, or, if appropriate, to the employer's agent. The *Determination and Transmittal* form shall indicate that the employer should submit all the documents to the appropriate INS office; and

(3) Whether the alien is abroad or in the U.S., if preference or non-preference numbers are not currently available, send the certified application containing the official labor certification stamp, supporting documentation, and complete *Determination and Transmittal* form to

the employer, or, if appropriate, to the employer's agent, indicating that the employer should file all the documents with the appropriate INS office;

§ 656.29 Filing of a new application after the denial of a labor certification.

(a) A new application for labor certification by the same employer involving the same occupation may be filed at any time after the expiration of 6 months from the date of a denial of certification, except that, if the certification was denied solely because the wage or salary offered was below the prevailing wage, the employer may reapply immediately pursuant to § 656.21 of this Part.

(b) An alien who is denied a labor certification for a *Schedule A* occupation may at any time have an employer file for a labor certification on the alien's behalf pursuant to § 656.21 of this Part.

§ 656.30 Validity of and invalidation of labor certifications.

(a) Except as provided in paragraph (d) of this section, a labor certification is valid indefinitely. Labor certifications for Household Domestic Service Workers and teachers which were granted under the previous regulations at 29 CFR Part 60 and which lapsed after one year, shall be deemed automatically revalidated on the effective date of this Part.

(b) (1) labor certifications involving job offers shall be deemed validated as of the date the local employment service office date stamped the application; and

(2) labor certifications for *Schedule A* occupations shall be deemed validated as of the date the applications were dated by the Immigration or Consular Officer.

(c) (1) A labor certification for a *Schedule A* occupation is valid only for the occupation set forth on the Application for Alien Employment Certification form and throughout the United States unless the certification contains a geographic limitation.

(2) A labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Application for Alien Employment Certification form.

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate.

(e) Certifying Officers shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officers shall issue such duplicate certifications only

to the Consular or Immigration Officer who submitted the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer.

§ 656.31 Labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a labor certification is discovered prior to a final labor certification determination, the Certifying Officer shall refer the matter to the INS for investigation, shall notify the employer of this referral in writing, and shall send a copy of the notification to the alien. If 90 days pass without the filing of a criminal indictment or information, the Certifying Officer shall continue to process the application.

(b) If it is learned that an application is the subject of a criminal indictment or information filed in a Court, the processing of the application shall be halted until the judicial process is completed. The Certifying Officer shall notify the employer of this fact in writing and shall send a copy of the notification to the alien.

(c) If a Court finds that there was no fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute, the Certifying Officer shall not deny the labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this Part.

(d) If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien.

§ 656.32 Fees for services and documents.

(a) No Department of Labor or State employment service agency employee shall charge a fee in connection with the filing, determination, reconsideration, or review of applications for labor certification. Such employees, on request, shall advise applicants on the completion of applications and on procedures set forth in this Part without charge. No charge shall be made for the issuance or transmission of a labor certification.

(b) The Department of Labor's regulations under the Freedom of Information Act at 29 CFR Part 70 on the Examination and Copying of Labor Department Documents provide that fees may be charged for special searching and copying services. These fees shall be applicable to requests to the Department for copies of documents in the custody of the Department which were produced pursuant to this Part, except for official copies of labor certification documents.

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Subpart D—Determination of Prevailing Wage

§ 656.10 Determination of prevailing wage for labor certification purposes.

(b) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage as required by § 656.21(b)(3) of this Part, shall be determined as follows:

(1) If the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR Part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq., 29 CFR Part 4, the prevailing wage shall be the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards Administration wage specialists if they need assistance in making this determination.

(2) If the job opportunity is an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(i) the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages; or

(ii) If the job opportunity is covered by a union contract which was negotiated at arms-length between a union and the employer, the wage rate set forth in the union contract shall be considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it shall be considered the "prevailing wage" for labor certification purposes.

(b) For purposes of this section, "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment," except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" shall mean:

(1) "Having jobs requiring a substantially similar level of skills within the area of intended employment"; or

(2) If there are no substantially comparable jobs in the area of intended employment, "having substantially comparable jobs with employers outside of the area of intended employment."

(c) A prevailing wage determination for labor certification purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other Federal, State or local law.

Subpart E—Definitions

§ 656.50 Definitions, for purposes of this Part, of terms used in this Part.

"Act" means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 et seq.

"Administrator" means the chief official of the United States Employment Service or the Administrator's designee.

"Agent" means a person who is not an employee of an employer, and who has been designated in writing to act on behalf of an alien or employer in connection with an application for labor certification.

"Application" means an Application for Alien Employment Certification form and any other documents submitted by an alien and/or employer (or their agents) in applying for a labor certification under this Part.

"Area of intended employment" means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

"Attorney General" means the chief official of the U.S. Department of Justice or the designee of the Attorney General.

"Certifying Officer" means a Department of Labor official who makes determinations about whether or not to grant applications for labor certifications:

(1) a regional Certifying Officer designated by a Regional Administrator, Employment and Training Administration (ETA) makes such determinations in a regional office of the Department;

(2) a regional Certifying Officer designated by the Administrator makes such determinations for the Virgin Islands;

(3) a national Certifying Officer makes such determinations in the national office of the USES.

(4) The addresses of the regional Certifying Officers are set forth in Subpart F of this Part.

"Consular Officer" means an official of the U.S. Department of State who handles applications for labor certifications pursuant to this Part.

"Determination and Transmittal form" means the form used by the Certifying Officer to notify employers of labor certification determinations.

"Employment" means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

"Employment and Training Administration (ETA)" means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

"Employee" means a person, association, firm, or a corporation which cur-

rently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. For purposes of this definition an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters.

"Hearing Officer" means a Department of Labor official, whether hearing officer or Administrative Law Judge, designated to preside at DOL administrative hearings.

"Immigration and Naturalization Service (INS)" means the agency within the U.S. Department of Justice which administers that Department's principal functions under the Act.

"Immigration Officer" means an official of the Immigration and Naturalization Service (INS) who handles applications for labor certifications pursuant to this Part.

"INS," see Immigration and Naturalization Service.

"Job opportunity" means a job opening for employment at a place in the United States to which U.S. workers can be referred.

"Labor certification" means the determination and certification to the Secretary of State and to the Attorney General by the Secretary of Labor pursuant to section 212(a)(14) of the Immigration and Nationality Act (1) that there are not sufficient U.S. workers who are able, willing, qualified, and available at the time of an alien's application for a visa and admission to the United States and at the place where the alien is to perform the work, and (2) that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

"Local employment service office" means an office of a State employment service agency which serves a particular geographic area within a State.

"Notice of Findings" means a notice which sets forth the bases upon which a Certifying Officer intends to deny a labor certification unless the bases are satisfactorily rebutted.

"Regional Administrator, Employment and Training Administration (ETA)" means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

"Schedule A" means the list of occupations set forth at § 656.10 of this Part, with respect to which the Administrator has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

"Schedule B" means the list of occupations set forth at § 656.11 of this Part,

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with respect to which the Administrator has determined that there are generally sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will generally adversely affect the wages and working conditions of United States workers similarly employed.

"Secretary" means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

"Secretary of State" means the chief official of the U.S. Department of State or the Secretary of State's designee.

"United States Employment Service (USES)" means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act of 1933, which is charged with administering the national system of public employment offices and with carrying out the functions of the Secretary under section 212(a)(14) of the Immigration and Nationality Act.

"United States worker" means any worker who, whether U.S. citizen or alien, is legally permitted to work permanently within the United States.

Subpart F—Addresses of Department of Labor Regional Offices

§ 656.60 Addresses of Department of Labor regional offices.

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): Room 1707, J. F. Kennedy Federal Building, Government Center, Boston, MA 02203.

Region II (New York, New Jersey, and Puerto Rico): Room 3713, 1515 Broadway, New York, NY 10036.

Region III (Delaware, Maryland, Pennsylvania, Virginia, West Virginia and the District of Columbia): P.O. Box 8796, Philadelphia, PA 19101 (3535 Market Street. Do not use street address for mailing purposes.).

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): Room 405, 1371 Peachtree Street, NE, Atlanta, GA 30309.

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin): 230 S. Dearborn Street, Chicago, IL 60604.

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas): Room

317, 555 Griffin Square Building, Griffin and Young Streets, Dallas, TX 75202.

Region VII (Iowa, Kansas, Missouri, and Nebraska): Room 1000, Federal Building, 911 Walnut Street, Kansas City, MO 64106.

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming): 1961 Stout Street, Denver, CO 80202.

Region IX (Arizona, California, Guam, Hawaii, and Nevada): Box 36084, Federal Office Building, 450 Golden Gate Avenue, San Francisco, CA 94102.

Region X (Alaska, Idaho, Oregon, and Washington): Room 1145 Federal Office Building, 909 First Avenue, Seattle WA 98174.

Virgin Islands—First National City Bank Building, Veterans Drive, St. Thomas, V.I. 00801.

Signed at Washington, D.C., this 13th day of January 1977.

WILLIAM H. KOLBERG,
Assistant Secretary
for Employment and Training.

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